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IN THE

Supreme Court of the United States

October Term, 1958

No. 873

CAMERON IRON WORKS, INC., *Petitioner,*

v.

LODGE NO. 12, DISTRICT NO. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS, *Respondent*

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals For The Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 30, 1958 (R. 63, App. 1), and judgment upon its petition for rehearing entered August 11, 1958 (R. 81) reversing the judgment of the United States District Court for the Southern District of Texas (R. 38) and remanding the cause to the District Court for further proceedings in accordance with the opinion of the Court of Appeals. The opinion of the Court of Appeals held that arbitration of the discharges

of striking employees can be ordered on suit of their collective bargaining representative even though such discharges are admittedly within the jurisdiction of the National Labor Relations Board. It so held even though the agreement between Petitioner and Respondent settling the strike during which the discharges occurred contained no provision for their arbitration, but provided merely for the reinstatement of striking employees *"lawfully* entitled to reinstatement", and even though the particular provisions of the collective bargaining agreement between Petitioner and Respondent pursuant to which the strike occurred were admittedly not subject to arbitration.

The record certified from the court below will be referred to as R.; the Appendix to this Petition as App.

Opinions Below

The District Court granted Petitioner's motion for summary judgment and entered judgment against Respondent on its action against Petitioner for decree of specific performance compelling arbitration of the strike discharges (R. 38), basing its judgment upon an opinion holding that there was no agreement to arbitrate the strike discharges either in the strike settlement agreement or in the collective bargaining agreement between Petitioner and Respondent (R. 31). The opinion of the Court of Appeals (not yet reported) styled Lodge No. 12, District No. 37, *International Association of Machinists v. Cameron Iron Works, Inc.*, is contained in the Appendix hereto (App. 2, R. 47).

Jurisdiction

The judgment of the Court of Appeals was dated and entered on June 30, 1958 (App. 1, R. 63) and Petitioner's petition for rehearing was denied on August 11, 1958 (R. 81). The jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1254(1).

Questions Presented

1. Does a contract provision to arbitrate differences "as to the meaning, application, or interpretation" of the provisions of a collective bargaining agreement render the admitted jurisdiction of the National Labor Relations Board over the subject matter of the proposed arbitration case non-exclusive; or has the National Labor Relations Act, As Amended, preempted the field of subject matter within the admitted jurisdiction of the National Labor Relations Board, e.g., discharge by an employer of employees for concerted activity in the course of a strike, so as to render the Board's jurisdiction exclusive, thereby depriving a private arbitration board appointed under a collective bargaining agreement of jurisdiction over the same subject matter so as to preclude a District Court from ordering such arbitration under Section 301 of the Labor-Management Relations Act?

2. Does a strike settlement agreement which provides for the reinstatement of those striking employees who are "lawfully entitled to reinstatement", and which contains no provision for the arbitration of strike discharges and no reference to the arbitration provisions of the collective bargaining agreement, repose the determination of the "lawful right to reinstatement" of a discharged striker in

the National Labor Relations Board, which admimittedly has jurisdiction, or does it repose such determination in the private arbitration board provided for in the separate collective bargaining agreement between the discharging employer and the collective bargaining representative of the discharged employees, so as to permit a District Court to order arbitration of the discharges under Section 301 of the Labor-Management Relations Act?

3. Can the discharges of employees for concerted activity during the course of a strike called under an admittedly non-arbitrable wage reopening and strike provision of a collective bargaining agreement be ordered arbitrated by a District Court under Section 301 of the Labor-Management Relations Act when the collective bargaining agreement contains no provisions governing the conduct of the parties during the course of such strike?

Statutes Involved

The statutes under which Petitioner contends that the discharge cases which the Court of Appeals has held to be subject to compulsory arbitration are within the exclusive jurisdiction of the National Labor Relations Board, i.e., Section 7 and portions of Sections 8 and 10 of the National Labor Relations Act, As Amended, are as set forth below:

29 *U.S.C.A.*, Section 157 (61 Stat. 140):

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 *U.S.C.A.*, Section 158 (61 Stat. 140):

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title * * *."

The statute making the jurisdiction of the National Labor Relations Board exclusive over all of the subject matter within the compass of the above-quoted statutory provisions is 29 *U.S.C.A.* 160 (61 Stat. 146):

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be

> affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

Respondent seeks to maintain its suit against Petitioner under authority of Section 301 of the Labor-Management Relations Act, 29 *U.S.C.A.*, Section 185 (61 Stat. 156):

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of the Case

Respondent sued under Section 301 of the Labor-Management Relations Act to compel arbitration of the discharges by Petitioner, an employer engaged in commerce and the production of goods for commerce, of fifteen employees who were advised by Petitioner "that they were discharged for alleged misconduct in connection with the strike recently concluded" (R. 5-8). Respond-

ent and its members went on strike on the question of wages, as permitted under the collective bargaining agreement between Petitioner and Respondent after failure to agree on proposed wage rate modifications after sixty days' wage reopening notice (R. 45A, pg. 32—Art. XX, Sec. 2). Upon termination of the strike, the Petitioner discharged the employees involved for alleged strike misconduct (R. 7). The strike was settled by written memorandum executed by Petitioner and Respondent, which provided in part: "Strikers who are lawfully entitled to reinstatement shall be reinstated to their respective jobs as rapidly as an orderly and economic readjustment of plant operations will permit, and in any event in not more than thirty days from the day the strike is discontinued" (R. 11-12). The strike settlement memorandum contained no provision for arbitration of the question of whether particular strikers "are lawfully entitled to reinstatement" and contained no reference to or incorporation of the arbitration provisions of the separate collective bargaining agreement between Petitioner and Respondent.

The provision of the collective bargaining agreement permitting Respondent to reopen wage rates for negotiation and to strike in the event of failure to reach agreement in sixty days (R. 45A, pg. 32, Art. XX, Sec. 2) admittedly precludes arbitration of the wage dispute and the right to strike because thereof under the grievance procedure and arbitration provisions contained in Articles IV and V of the collective bargaining agreement (R. 45A, pp. 4-8). The collective bargaining agreement is silent on and contains no provision whatever governing the actions and conduct of Petitioner, Respondent, or the

employees during the course of a strike such as the one the Respondent called under the wage-reopening provision (R. 45A).

Respondent's suit to compel Petitioner to arbitrate the strike discharges which it had refused to arbitrate (R. 5) was contested by Petitioner on the ground that there was no agreement to arbitrate the strike discharges either under the strike settlement memorandum, the governing instrument, or under the separate collective bargaining agreement, if it were deemed applicable, and on the further ground that in any event the determination of the issue over the strike discharges was vested exclusively in the National Labor Relations Board (R. 14-20). Both Respondent and Petitioner moved for summary judgment (R. 23-31). Petitioner's motion for summary judgment was granted and judgment was entered for Petitioner (R. 38-39) on a finding by the District Court that there was no agreement to arbitrate the strike discharges either under the strike settlement memorandum or the separate collective bargaining agreement, the Court not reaching the issue of the exclusive jurisdiction of the National Labor Relations Board (R. 31-37).

The Court of Appeals in reversing and remanding the judgment of the District Court has not only held that there was an agreement to arbitrate the strike discharges but has held that such arbitration may be specifically directed even though the subject matter of the proposed arbitration cases is admittedly within the jurisdiction of the National Labor Relations Board (App. 2).

Reasons For Granting The Writ

This Court has not decided or had presented to it for decision the issue of whether arbitration may be judicially compelled of a controversy within the admitted jurisdiction of the National Labor Relations Board. This is an issue of national importance involving the construction of the basic federal statute governing labor relations. The Court of Appeals holding that Section 301 of the Labor-Management Relations Act requires judicial compulsion of arbitration of a controversy concededly within the ambit of Section 10(a) of the National Labor Relations Act, As Amended, squarely presents the accommodation of each of these two vital statutory enactments to the other. The issue presented necessitates comporting judicially directed arbitration of labor controversies under *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912, 1 L.E. 2d 972, and companion cases, with the exclusive jurisdiction of the National Labor Relations Board over such controversies under *Garner v. Teamsters Union*, 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228, and succeeding cases through *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S. Ct. 598, 1 L. Ed. 2d 601, and companion cases. The Court of Appeals resolved the accommodation question by giving predominant effect to Section 301 under Lincoln Mills despite the exclusive jurisdiction provisions of Section 10(a) as construed in Garner through Guss, i.e., by adjudicating in favor of court-compelled arbitration of a controversy concededly within the jurisdiction of the National Labor Relations Board.

The Court of Appeals opinion recognizes that the issue of whether a Federal Court may enforce arbitration under

Section 301 of the Act of a controversy within the jurisdiction of the National Labor Relations Board under Sections 7, 8 and 10(a) of the Act has not been previously decided by this Court, the Court of Appeals opinion stating: "This question has not been raised previously in this Court, nor has it been decided by the Supreme Court" (App. 9, R. 55)

The United States Court of Appeals for the First Circuit in *United Electrical Workers v. Worthington Corp.*, 236 F. 2d 364, made the same declaration:

> "However, there has not yet been a Supreme Court decision involving the jurisdiction of a court or arbitrator over acts constituting a contract violation as well as an unfair labor practice."

It is therefore submitted that the Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court.

In addition, the Court of Appeals has decided this federal question in a way in conflict with the decisions of other United States Courts of Appeals on the same matter. The Court of Appeals recognizes this fact in footnote 14 to its opinion (App. 2, R. 55) in which it states:

> "The following cases held that the jurisdiction of the Board in the field of unfair labor practice would pre-empt state agencies *or private arbitrators* from acting: NLRB v. International Union, 7th Cir. 1952, 194 F. 2d 698; NLRB v. Wagner Iron Works, 7th Cir. 1955, 220 F. 2d 126; McAmis v. Panhandle Eastern Pipe Line Co., Mo. Ct. App. 1954, 273 S.W. 2d 789."

The vital national importance of a proper reconciliation of suits to enforce arbitration under Section 301 with the exclusive jurisdiction of the National Labor Relations Board over controversies within the ambit of the Act was emphasized by Mr. Jerome Fenton, General Counsel of the National Labor Relations Board, in a paper delivered at an Institute at the University of Michigan Law School on August 1, 1958 (*42 LRR* 423, 425) in which he stated:

> "Stated more concretely, the problem is this: As I indicated at the outset, Section 301 confers upon the courts jurisdiction to redress breaches of a collective bargaining agreement. The Supreme Court has recently held that, in the exercise of this jurisdiction, the courts are empowered to decree specific performance of an agreement to arbitrate. But where the contract question also involves unfair labor practice conduct, does this jurisdiction empower the courts to provide a remedy different from, and in conflict with, one which the Board would provide for the same conduct? For example, does Section 301 empower a court specifically to enforce an arbitration award which the Board had found to be contrary to the policies of the National Labor Relations Act, and thus had decreed contrary relief? If it does, the court, under Section 301, may well be in a position where it could impair the effectiveness of Board unfair labor practice decisions, and diminish the heretofore exclusive nature of the Board's jurisdiction. * * *"

Petitioner further urges that the decision of the Court of Appeals that there was an agreement to arbitrate, the strike discharges even though the strike settlement memorandum, the controlling instrument, provided merely for the reinstatement of all striking employees who were "law-

fully entitled to reinstatement" and contained no provision for arbitration or reference to or incorporation of the arbitration provisions of the separate collective bargaining agreement, and even though the separate collective bargaining agreement contained no provisions governing the conduct or actions of the employer, the union, or the employees during the course of a strike, conflicts with the decision of the United States Court of Appeals for the First Circuit in *Local No. 149 of American Federation of Technical Engineers (AFL) v. General Electrical Company*, 250 F. 2d 922, certiorari denied, ____ U.S. ____, 2 L. Ed. 2d 813. The latter case on identical contract language with the present case as to scope of arbitration held that arbitration should not be judicially directed where there was no express contract provision to be interpreted or applied governing the subject matter of the particular controversy.

Petitioner additionally submits that the decision of the Court of Appeals in this case that strike conduct and strike discharges are arbitrable even though the strike to which they were incident and the wage-reopening about which the strike occurred are admittedly not arbitrable is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *International Union, United Automobile Workers v. Benton Harbor Malleable Industries*, 242 F. 2d 536, cert. denied, 355 U.S. 814, and the decision of the same circuit in *Hoover Motor Express Co. v. Teamsters Union*, 217 F. 2d 49, in which it was held that a claimed breach of the no-strike clause of a collective bargaining agreement was not subject to arbitration under the arbitration provisions of such agreement.

Point One

The Court of Appeals has decided erroneously an important question of federal law which this Court has not settled but should determine in holding contrary to other courts of appeals that arbitration may be judicially directed of a controversy admittedly within the jurisdiction of the National Labor Relations Board.

The Respondent's complaint alleges, and it is admitted, that the Petitioner is engaged in interstate commerce and in the production of goods for commerce, within the meaning of the Act (R. 5). The complaint alleges, and it is admitted, that Petitioner discharged the employees involved for alleged misconduct during the course of and in connection with a lawful strike (R. 6-8). Under a long line of decisions of this Court, these allegations would place the controversy beyond the jurisdiction of any state agency or state court and within the exclusive jurisdiction of the National Labor Relations Board. *Garner v. Teamsters Union, supra; Capital Service, Inc. v. National Labor Relations Board*, 347 U.S. 501, 98 L. Ed. 887, 74 S. Ct. 699; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 99 L. Ed. 546, 75 S. Ct. 480; *Building Trades Council v. Kinard Construction Company*, 346 U.S. 932, 98 L. Ed. 423; *Guss v. Utah Labor Relations Board, supra; Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20, 1 L. Ed. 2d 613, 77 S. Ct. 604; and *San Diego Building Trades Council v. Garmon*, 353 U.S. 26, 77 S. Ct. 607, 1 L. Ed. 2d 618.

The Court of Appeals opinion holds that the claimed application of this line of cases to the present case "over-

looks the obvious distinction between *contract provisions* and *matters committed exclusively to the Board*". Section 10(a) of the National Labor Relations Act, As Amended, recognizes no such "obvious distinction" when it places remedies established by private "agreement" and remedies established by state "law" on the same basis: "This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise".

The claimed distinction has also been rejected by various decisions by other Courts of Appeal whose decisions conflict with the present decision on the same matter. The United States Court of Appeals for the Ninth Circuit in *National Labor Relations Board v. Walt Disney Productions*, 146 F. 2d 44, held to the contrary of the present decision, stating in part: "Clearly, agreements between private parties cannot restrict the jurisdiction of the Board". As acknowledged in footnote 14 in the Court of Appeals opinion in the instant case, the Seventh United States Court of Appeals has held to the contrary in *National Labor Relations Board v. International Union*, 194 F. 2d 698, and in *National Labor Relations Board v. Wagner Iron Works*, 220 F. 2d 126. In the first case, the Seventh United States Court of Appeals said: "The Board's exclusive function in this field may not be displaced by action before State agencies or by arbitration". In the *Wagner* case, the same court said: "Furthermore, arbitration provisions in a bargaining agreement cannot oust the Board's jurisdiction to prevent unfair labor practices".

The fallacy in the reasoning of the subject opinion is primarily in its failure to distinguish between the *voluntary* arbitration of a controversy within the jurisdiction

of the National Labor Relations Board, in which case the Board may respect the arbitration award or not as it sees fit, and *compulsory* arbitration of such a controversy under court decree. Cf. Board decisions *In Re Speilberg Mfg. Co.*, 112 NLRB No. 139, 36 LRRM 1152, in which the Board decided to observe arbitration awards in strike discharge cases where the parties voluntarily agreed to arbitration of the discharges after they had occurred, and *Wertheimer Stores Corp.*, 107 NLRB 1434, 33 LRRM 1398, in which the Board refused to respect an arbitration award when arbitration was had over the opposition of the individual involved. It is in the court compelled arbitration situation where General Counsel Fenton inquires, supra, how does the Board stand if it does not wish to observe an arbitration award rendered under court decree or ordered enforced by court decree? The question posed spotlights the necessity of exclusive jurisdiction of the Board over a controversy within its compass as against court compelled arbitration of the same controversy. If court compelled arbitration in this case finally bound Respondent by the arbitration award, then the Board would be ousted in a controversy over which it has admitted jurisdiction. If the Respondent was not so bound, then the Respondent would be given two chances to win the same case and Petitioner would be forcibly subjected to two chances of losing. The latter unwholesome result would be comparable to subjecting a citizen to double jeopardy in a criminal case and would in practical effect deny Petitioner both that fair play which is the essence of due process of law and the equal protection of the law.

The Court of Appeals in the present case admits that "the same conduct here involved would constitute a violation of the contract and an unfair labor practice" and

then rejects any meaningless distinction between a contract part and an unfair labor practice part of the same conduct as follows:

> "We think it too technical and obtrusive to attempt a division of the present controversy into a contract part and an unfair labor part. Such a division is merely a play on words. It is better to call the spade and say that enforcement of a contract to arbitrate grievances is different from an adjudication of an unfair labor practice by the National Labor Relations Board. This will prevent the nebulous determination of *what part* is contract and *what part* is unfair labor practice when the *one part* constitutes both". (App. 13).

In substance, then, the Court of Appeals holds that the indivisible "one part" shall be adjudged in arbitration under a decree of specific performance even though the National Labor Relations Board has jurisdiction to and may adjudicate the same "one part" - simply because the proceedings are "different". This Court has repeatedly and sternly rejected any such impingement upon the exclusive jurisdiction of the National Labor Relations Board by state courts or state agencies under any such theory of concurrent jurisdiction. The Court of Appeals decision of which review is here sought decrees an infringement upon the exclusive jurisdiction of the National Labor Relations Board by private arbitration under federal judicial decree which would undoubtedly be denied under identical circumstances to any agency or any court of any sovereign state.

The Court of Appeals states the basis of its holding plainly: "We believe that this decision is required by the teaching of the recent *Lincoln Mills* cases". *Textile Work-*

ers Union v. Lincoln Mills, supra; Goodall-Sanford, Inc. v. United Textile Workers, 353 U.S. 550; *General Electric Co. v. Local Union 205, United Electrical Workers*, 353 U.S. 547. The short and sufficient answer is that the issue of the exclusive jurisdiction of the National Labor Relations Board over the controversy was neither invoked nor involved in any of the *Lincoln Mills* cases. The Court of Appeals opinion admits that "these cases did not concern an issue which was both contracted to be arbitrable and concerned unfair labor practice".

The issue of judicially decreeing arbitration of a controversy within the jurisdiction of the National Labor Relations Board was not mentioned, discussed, decided or, under their facts, even subject to being raised in any of the *Lincoln Mills* cases. As since held by the United States Court of Appeals for the Second Circuit in *A. H. Bull Steamship Co. v. Seafarers' International Union*, 250 F. 2d 326: "The ultimate question in Lincoln Mills was whether or not Congress by Section 301 of the Taft-Hartley Act authorized the federal courts to compel arbitration".

The *Lincoln Mills* cases required no decision running counter, as the current decision does, to the underlying basis and reasoning of this Court's long line of pre-emption cases. At the least, as stated by the Massachusetts Supreme Judicial Court in the case of *Post Publishing Co. v. Cort*, 134 N.E. 2d 431: "Decisions of the Supreme Court of the United States have not yet passed upon the jurisdiction of an arbitrator to adjudicate a contract violation which is also an unfair labor practice. 69 *Harv. L. Rev.* 726".

Point Two

The holding of the Court of Appeals that lawful right of strikers to reinstatement should be arbitrated instead of adjudicated by the National Labor Relations Board when the strike settlement agreement contained no provision for arbitration is in conflict with the decision of another court of appeals.

The special agreement settling the strike because of which the discharges occurred provided only for the reinstatement of "strikers who are lawfully entitled to reinstatement". It contained no provision whatever for arbitration of the issue of whether particular strikers were "lawfully entitled to reinstatement". Although it contained references to the collective bargaining agreement in other connections, it contained no reference to and incorporated none of the arbitration provisions of the collective bargaining agreement in connection with determining the issue of "strikers who are lawfully entitled to reinstatement". (See R. 11-12). The Court of Appeals nevertheless holds that "the question of which strikers are 'lawfully entitled to reinstatement' must be considered an arbitrable matter rather than left to the unilateral determination of the Company * * * " (App. 8, R. 54).

The plain error in this holding by the court below is that the parties in the governing instrument, i.e., the strike settlement agreement, repose the determination of the issue neither in arbitration nor in the unilateral determination of the Company. It provided only for the reinstatement of those strikers who were *lawfully* entitled to reinstatement. It therefore provided for determination of the issue by the only applicable *law*, the National Labor

Relations Act, by the only agency empowered to make such a determination, the National Labor Relations Board. The parties expressly agreed to limit reinstatement to those having a *lawful right* and did not provide for any *contract right* of reinstatement. Only the National Labor Relations Board can adjudicate the former and a private arbitration board could do nothing more than decide the latter—for which there is no contract provision. The parties by their governing agreement left the determination of the reinstatement right of discharged strikers to the National Labor Relations Board, the agency having exclusive jurisdiction under the law to make such determination. Under the most elementary rules of construction, if the parties had intended to agree to arbitrate these reinstatement rights, they would have done so either by express provision in the strike settlement agreement or by reference to and incorporation of the arbitration provisions in the separate collective bargaining agreement. The parties in their strike settlement agreement did neither. In connection with adjustments in contract wage rates and contract provisions for further wage reopenings, the parties made express reference to the collective bargaining agreement in their strike settlement agreement. In connection with the reinstatement rights of discharged strikers, they did not. They left this issue to determination under the National Labor Relations Act by the National Labor Relations Board.

In finding an agreement to arbitrate the strike discharges in the absence of any provision therefor in the strike settlement memorandum, the Court of Appeals rendered a decision in conflict with the decision of the United States Court of Appeals for the First Circuit in *Local No. 149 of American Federation of Technical Engineers (AFL)*

v. General Electric Company, supra, which holds that arbitration is not to be decreed unless there is a clear, definite and unambiguous provision to arbitrate the specific controversy.

Point Three

The decision decreeing arbitration of strike discharges occurring under an admittedly non-arbitrable wage reopening and strike provision in a collective bargaining agreement containing no provision governing the conduct of the parties during the course of a strike is in conflict with the decisions of other courts of appeals.

The Respondent struck under a specific provision of the collective bargaining agreement permitting a wage reopening and a strike in the event of failure to reach agreement on wage adjustments in sixty days (R. 6, 45A, Pg. 32). The collective bargaining agreement contains no provision whatever governing or referring to the conduct and the actions of the employer, the union or the employees during the course of the strike but is utterly silent with reference to the strike. (R. 45A). The wage reopening, differences over wage adjustments and a strike over wage disagreement are all admittedly non-arbitrable. Nevertheless, the Court of Appeals holds incidents to and parts of the non-arbitrable wage controversy and non-arbitrable strike to be arbitrable despite the total absence of provisions governing strike actions or strike conduct.

Petitioner submits that this portion of the decision of the court below is also in conflict with the decision of the United States Court of Appeals for the First Circuit

in *Local No. 149 of American Federation of Technical Engineers (AFL) v. General Electric Company, supra.* The collective bargaining agreements in the two cases contain almost identical language on the scope of arbitration. In our case arbitration is limited to "any difference" between the parties "as to the meaning, application, or interpretation of the provisions" of the agreement (R. 45A, Pgs. 4-8). In the *Technical Engineers* case arbitration is limited almost identically to "any grievance which involves the interpretation or application" of the agreement. In the *Technical Engineers* case the Court of Appeals held that a grievance claiming that employees were improperly classified and that the jobs being performed by them came within a higher grade and a higher rate among those enumerated in the contract than the grade and rate at which they were being classified and paid was not arbitrable because: "There is no language in the collective bargaining agreement to be interpreted and applied for the purpose of determining whether the duties performed by a particular employee entitle him to be classified in any particular 'grade', carrying with it a corresponding wage rate". Likewise, in our case "there is no language in the collective bargaining agreement to be interpreted and applied" governing the reinstatement rights of employees discharged during the course of a strike conducted under a non-arbitrable wage reopening and strike provision since there is no provision whatever governing the actions, conduct and rights of parties during the course of such strike.

The Court of Appeals opinion concedes that a case is not arbitrable "where the controversy or grievance concerns violation of a 'no-strike clause'" (App. 8, R. 53) but proceeds to hold that the discharges of strikers are arbitrable even though the very contract provision under

which they struck is concededly non-arbitrable! How can an incident to and a part of this non-arbitrable strike, i.e., the affected employees' strike conduct or mis-conduct and their proper or wrongful discharge by Petitioner, be held arbitrable when the only contract clause under which they could strike is held to be non-arbitrable? Petitioner submits that this portion of the opinion of the court below is in conflict with the decisions of the United States Court of Appeals for the Sixth Circuit in *International Union, United Automobile Workers v. Benton Harbor Malleable Industries, supra*, and *Hoover Motor Express Co. v. Teamsters, supra;* with the decision of the Court of Appeals for the Seventh Circuit in *Cuneo Press v. Kokomo Paper Handlers' Union*, 235 F. 2d 108; with the decision of the Second Circuit Court of Appeals in *Markel Electric Products v. United Electrical Workers*, 202 F. 2d 435; and with the decision of the Fourth Circuit Court of Appeals in *United Electrical Workers v. Miller Metal Products*, 215 F. 2d 221. These cases and others all reject the arbitrability of grievances or controversies arising under a no-strike clause of a collective bargaining agreement. No different rule is logical or tenable for controversies or disputes arising as a part of or incident to a non-arbitrable wage re-opening and strike permissive provision.

As stated in *McCarroll v. Los Angeles County District Council of Carpenters*, 315 P. 2d 322, by the Supreme Court of California, in which certiorari has been denied by this Court, 2 L. Ed. 2d 415, ____ U.S. ____: "The grievance and arbitration procedure assumes that work goes on. Resort to the procedure is designed to avoid the necessity of a strike, not to adjudicate a strike once it has occurred, and the purpose of the procedure limits its applicability".

Conclusion

The questions presented for review are of vital, national importance to the future administration of the basic federal statute governing labor relations. This Court has not expressly decided the important question under the federal statute of whether the exclusive jurisdiction of the National Labor Relations Board over a controversy which could not be infringed upon by a state court or a state agency may nevertheless be impinged upon by private arbitration judicially directed in a suit under Section 301 of the federal statute. This question should be settled—particularly since the decision of the Court of Appeals is admittedly in conflict with the decisions on the same matter by the Courts of Appeals of other circuits and is seemingly decided in a way probably not in accord with the applicable decisions of this Court.

Further, the processes of voluntary arbitration of labor disputes favored by federal policy will not be promoted by judicial compulsion of arbitration of controversies which the parties have not agreed to arbitrate by clear and unambiguous contract clauses. The holdings of the court below that arbitration should be decreed of the "lawful right to reinstatement" which the parties have seemingly left to determination under the law by the National Labor Relations Board and that arbitration should be decreed of strike discharges which are incident to and a part of a strike called under a concededly non-arbitrable wage reopening and strike provision will not promote the federal policy favoring voluntary arbitration of labor disputes, but will make parties exceedingly cautious and overly chary concerning the meticulous language of their arbitration provisions. In addition, such decisions seem

to be in conflict with decisions of Courts of Appeals for other circuits.

It is accordingly urged that a writ of certiorari to review the judgment of the court below should be granted.

Respectfully submitted,

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APPENDIX

JUDGMENT

Extract from the Minutes of June 30, 1958.

LODGE No. 12, DISTRICT No. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS,

No. 17025. versus

CAMERON IRON WORKS, INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Cameron Iron Works, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, concurs in the result."

OPINION

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17025

LODGE No. 12, DISTRICT No. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS, Appellant,

versus

CAMERON IRON WORKS, INC., Appellee

Appeal from the United States District Court for the Southern District of Texas

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(June 30, 1958)

Before HUTCHESON, Chief Judge, and RIVES and CAMERON, Circuit Judges.

RIVES, Circuit Judge: The appellant and the appellee are parties to a collective bargaining contract within the purview of the National Labor Relations Act.[1] The contract was effective for a two-year period from June 1, 1956, through May 31, 1958, and included a renewal provision. Under the terms of the contract, the right to employ and discharge employees, while vested exclusively in the Company, is subject to certain limitations, one being that a discharge may constitute a "griev-

[1] 29 U.S.C.A. §151, et seq.

ance." A "grievance procedure" is specified for *any* difference arising between the Company and any employee as to the meaning, application or interpretation of the contract; an unsettled grievance may be submitted to arbitration. Pertaining to arbitration, Article V, Section 2 of the contract states:

> "The Board of Arbitration shall render a decision within fifteen (15) days from the date the hearing is completed. The terms and conditions of settlement shall be within the sole discretion of the Board and the decision of a majority of the Board shall be final and binding on the parties; provided, however, the Board shall have no authority to violate, contravene, disregard or supplement the terms of this agreement."

The contract contains a "wage reopening clause" which states that the question of wages can be reopened by either party once a year upon giving thirty days' written notice to the other, and if no agreement is reached within sixty days after the notice, any strike limitation on the Union terminates.

The appellant reopened the question of wages under the "wage reopening clause" and, after reaching no agreement, effected a strike on April 29, 1957. The strike ended on June 8, 1957, with a settlement of a three cent per hour wage increase. The settlement agreement was in the form of a letter from the Company accepted by the appellant. The last paragraph of this letter states:

> "*Strikers who are lawfully entitled to reinstatement* shall be reinstated to their respective jobs as rapidly as an orderly and economic readjust-

> ment of plant operations will permit, and in any event in not more than thirty (30) days from the date the strike is discontinued. Reinstatement notices will be mailed to the last known address of striking employees. Employees who do not report for duty, or submit a valid reason for not reporting, within five (5) days after reinstatement notice is mailed shall forfeit any right to reinstatement. These provisions shall not in any way prejudice the right of the company to reduce the working force." (Emphasis supplied.)

Upon the termination of the strike, fifteen employees, members of appellant, were discharged or were refused reinstatement because of "strike misconduct."

Appellant demanded arbitration of the discharge of or refusal to reinstate the fifteen employees and, upon refusal by the Company, brought this action to compel arbitration under the contract, invoking the jurisdiction of the federal courts under section 301 of the Act.[2] The trial judge granted summary judgment for the Company under Rule 56, Federal Rules of Civil Procedure.

The Company defends this action upon two grounds: first, that the arbitration provisions of the contract are in no way applicable to the matter of discharging or refusing to reinstate the fifteen employees released for misconduct during the strike; second, if the arbitration provisions are applicable, the matter of discharge or reinstatement is within the exclusive jurisdiction of the National Labor Relations Board which renders an ar-

§185.

[2] Title III, Section 301, National Labor Relations Act, 29 U.S.C.A.

bitration agreement on this matter unenforceable. The trial court held the first defense good and declined to consider the second. It reasoned that the parties intended by the contract to submit grievances to arbitration only where the *operations of the Company were normal;* that the employees were not in the employ of the Company since the strike precluded normal operations; and that the language of the Settlement Agreement implied that the Company should unilaterally decide who was "lawfully entitled to reinstatement." The pertinent portion of the trial judge's memorandum opinion is printed in the margin.[3]

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[3] " other than is contained in such quoted Section [the section giving power to the Company to employ and discharge], there is nothing in the agreement that in so many words prohibits Company from discharging such employees. But the spirit of the Agreement seems to be that restrictions are intended, in that under Section 13, Article XII, of the Agreement, if an employee is discharged, the cause of his discharge must be made known to him. Also in that under Articles IV and V, the discharge of an employee may constitute a 'grievance' covered by the 'Grievance Procedure' and by the provisions (Articles IV and V) covering Arbitration.

"It is probably true that under the normal operations under such Agreement had any of the persons employed thereunder by Company been discharged by Company, such discharge would have been covered by the Grievance Procedure and Arbitration provisions in Articles IV and V.

"But operations were not normal. There were negotiations between Union and Company for higher wages for such employees and there were disagreements, followed by a strike of such employees. For more than forty (40) days, the persons employed under the Agreement did no work for Company, were paid no wages by Company, and were not subject to the orders of Company—indeed, they were not in the employ of Company. Company did not want to re-employ some of such persons because of alleged misconduct by them during the strike. So situated, the parties executed the Settlement Memorandum, increasing wages and ending the strike. In such Settlement Memorandum, former employees are referred to as 'strikers', 'striking employees', and

Since we disagree with the district court's opinion that no arbitration would lie to the matter at bar, we must also decide the issue of pre-emption raised by the appellee.

I. Was the Dispute Arbitrable?

Initially, the appellant earnestly contends that the question of arbitrability should be determined by the arbitration board in this case, saying that the lower court should not have decided the issue of arbitrability in view of the contract provision that "any grievance" could be arbitrated. While there is much to say in favor of appellant's argument,[4] the courts have, with practical uniformity, held the question of arbitrability to be an issue for the courts—that is, the courts decide if the particular grievance is arbitrable under the terms of the col-

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'employees', and presumably because the misconduct charged against some of them was very seriously regarded by Company, it is provided that only 'Strikers who are lawfully entitled to reinstatement shall be reinstated.'

"There is nothing said in the Settlement Memorandum about how the matter of who was guilty of misconduct and who was 'lawfully' entitled to be reinstated should be determined. There is nothing said about arbitrating the matter either under the Agreement or otherwise. As stated, it may be that it was intended that Company should decide the matter.

"I do not believe the Agreement and the Settlement Memorandum, when construed together or separately, mean that the matter is to be arbitrated under the provisions of the Agreement."

[4] See 1951 Majority Report, Committee on Improvement of Administration of Union-Employer Contracts, Section of Labor Relation Law, American Bar Association; Justin, **Arbitrability and the Arbitrator's Jurisdiction, MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS** (1956); Davey, **Discussion, Arbitrability and the Arbitrator's Jurisdiction, MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS** (1956); Pirsig, **Some Comments on Arbitration Legislation and the Uniform Act**, 10 **VAN-**

lective bargaining contract.[5] This is true even where the contract specifies that *any* controversy relating to the meaning or interpretation or application of the contract is arbitrable.[6] Perhaps, if the contract expresses that the arbitrators will decide arbitrability, the courts would refrain from a decision.[7] We will not delve into the intricacies or the merits of either side of this problem.

The general policy considerations of promoting harmonious interplay and propitious relations between labor and management, which will achieve industrial peace, have been given their full weight in the interpretation of collective bargaining contracts. With this search for true tranquillity in the industrial world ever in mind, the courts have crystalized from the supersaturation of liti-

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DERBILT L. REV. 685 (1957); Cox, **Some Lawyers' Problems in Grievance Arbitration, 10 MINN. L. REV.** 41 (1955); Clifton, **Arbitration and Arbitrability,** 3d Annual Conf. on Labor N.Y.U. 187 (1950). See also many articles in the Labor Arbitration Reports published by the Bureau of National Affairs, arbitration cases found in the American Labor Arbitration Awards published by Prentice Hall, and material in The Arbitration Journal, published by the American Arbitration Association.

[5] See Annotation 24 A.L.R. 2d 752, 766.

[6] E.g., Engineers Ass'n v. Sperry Gyroscope Co., etc., 2d Cir. 1957, 251 F. 2d 133; Local No. 149, etc. v. General Electric Company, 1st Cir. 1957, 250 F. 2d 922; Goodall-Sanford, Inc. v. United Textile Workers, 1st Cir. 1956, 233 F. 2d 104; Wilson Brothers v. Textile Workers Union, S.D. N.Y. 1954, 132 F. Supp. 163; Textile Workers Union v. American Thread Co., D. Mass. 1953, 113 F. Supp. 137; Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, 382 Pa. 326, 115 A. 2d 633, cert. denied, 350 U.S. 843; McCarroll v. Los Angeles County District Counsel of Carpenters, Cal. 1957, 315 P. 2d 322.

[7] See dicta in International Union, etc. v. Benton Harbor Mal Ind., 6th Cir. 1957, 242 F. 2d 536; Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, note 6 supra; McCarroll

gation since 1947 several "rules of construction" in the interpretation of collective bargaining contracts to arbitrate. We consider the general rule to be that a dispute between labor and management is arbitrable where the dispute is specifically contracted to be arbitrable or generally where the contract expresses a broad arbitration policy, i.e., a general arbitration clause;[8] but controversies are not arbitrable where the controversy in question is specifically excluded, where because of a listing of many arbitrable incidences the instant controversy is impliedly excluded,[9] and where the controversy or grievance concerns violation of a "no strike clause."[10]

In the case at bar, not only does the contract specifically state that grievances arising from discharges may be arbitrated but it also has the general provision that "any difference" arising "between the Company and any

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v. Los Angeles County District Council of Carpenters, note 6 supra. However, in Monument Mills v. Textile Workers Union, D. Mass. 1957, 152 F. Supp. 429, the court held that arbitrability was for the arbitrators in view of the language of the collective bargaining contract.

[8] American Lava Corp. v. Local Union No. 222, etc., 6th Cir. 1958, 259 F. 2d 137; Goodall-Sanford, Inc. v. United Textile Workers, 1st Cir. 1956, 233 F. 2d 104; Wilson Bros. v. Textile Workers, D.C. N.Y. 1954, 132 F. Supp. 163.

[9] Local No. 149, etc. v. General Electric Company, 1st Cir. 1957, 250 F. 2d 922; United Furniture Workers v. Little Rock Furniture Mfg. Co., E.D. Ark. 1957, 148 F. Supp. 129.

[10] International Union, etc. v. Benton Harbor Mal. Ind., 6th Cir. 1957, 242 F. 2d 536; Cuneo Press v. Kokomo Paper Handlers' Union No. 34, 7th Cir. 1956, 235 F. 2d 108; Hoover Motor Exp. Co. v. Teamsters, Chauffeurs, etc., 6th Cir. 1954, 217 F. 2d 49; Markel Electric Prod. v. United Electrical, R. & M. Wkrs., 2d Cir. 1953, 202 F. 2d 435; United Electrical, R. & M. Wkrs. v. Miller Metal Prod., 4th Cir. 1954, 215 F. 2d 221.

employee as to the meaning, application or interpretation of the provisions" of the contract may constitute a grievance and, if not settled, may be arbitrated. We cannot agree with the trial court that the parties contemplated the contract to cover only "normal operations free from strike," nor can we agree that the striking employees were not in the employ of the Company.[11] The contract implies a broader, even an inclusive, coverage. The preamble of the contract states:

> "Article I—Preamble
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> "The intent and purpose of the parties hereto is that this agreement will promote, improve, and maintain industrial economic and harmonious relations between the Union and the Company and to set forth herein the basic agreement covering rates of pay, hours of work, and conditions of employment to be observed between the Company and its employees."

We cannot interpret the contract to say that grievances arising from a discharge of employees for strike misconduct, where the employees were striking under the terms of the contract, would be impliedly excluded from arbitration. Neither did the settlement memorandum impliedly exclude from arbitration any arbitrable matter in the contract. The question of which strikers are "lawfully entitled to reinstatement" must be considered an arbitrable matter rather than left to the unilateral determination of the Company in order to preserve the

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[11] Section 2(3) of the Act [29 U.S.C.A. §152(3)]; N.L.R.B. v. Mackay Radio & Telegraph Co., 1938, 304 U.S. 333, 345; N.L.R.B. v. U. S. Cold Storage Corp., 5th Cir. 1953, 203 F. 2d 924, 927.

terms of the contract relating to seniority, retirement, etc., and to carry out its general intent and purpose.

II. Exclusiveness of Jurisdiction

The second ground of defense presents the question of whether parties to a collective bargaining agreement may contract to submit matters involving unfair labor practices[12] to private arbitrators with such contract enforceable by the federal courts under section 301 of the Act, or whether all controversies concerning unfair labor practices are within the exclusive jurisdiction of the National Labor Relations Board which pre-empts the federal courts from acquiring jurisdiction over a contract violation which happens also to be an unfair labor practice. This question has not been raised previously in this Court, nor has it been decided by the Supreme Court.

The appellee asserts that, since the discharges were made because of *union activity*—protected or unprotected—which presents the question of unfair labor practice vel non,[13] and since the exclusive jurisdiction of the Board pre-empts state courts and agencies from deciding issues involving such unfair labor practices,[14] certainly

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[12] Section 8 of the Act [29 U.S.C.A. §158].

[13] Appellee's contentions are generally that in discharging the fifteen employees the appellee is either guilty of unfair labor practice under section 8(a)(1) or (3) [29 U.S.C.A. §158(a)(1) or (3)], in which event the employees' strike activities would be "protected," or the appellee is not guilty of unfair labor practice, in which event the strike conduct is an "unprotected" activity; and in either event, the N.L.R.B. has exclusive jurisdiction to decide.

[14] The following cases held that the jurisdiction of the Board in the field of unfair labor practice would pre-empt state agencies or private arbitrators from acting: N.L.R.B. v. International Union,

the parties cannot by contract give to private arbitrators more jurisdiction than is afforded to state courts. However, the appellee overlooks the obvious distinction between *contract provisions* and *matters committed exclusively to the Board*. If an arbitrable contract violation encompasses an unfair labor practice, the majority of the courts have held that arbitration is proper to decide all matters not included in the pre-emptive area. Likewise, the better-reasoned cases hold that even where the aggrieved inci[illegible]at or act constitutes both a contract violation and an unfair labor practice, particularly concerning a substantive contract right such as employment or pay, the federal district courts will not be deprived of jurisdiction to grant relief as to the breach of contract, the other aspect being left to the Board.[15]

7th Cir. 1952, 194 F. 2d 698; N.L.R.B. v. Wagner Iron Works, 7th Cir. 1955, 220 F. 2d 126; McAmis v. Panhandle Eastern Pipe Line Co., Mo. Ct. App. 1954, 273 S.W. 2d 789.

Where union activity violated state laws and was also within the scope of the National Labor Relations Act, state enforcement was held to be void. Garner v. Teamsters Union, 1953, 346 U.S. 485; Capital Service, Inc. v. N.L.R.B., 1954, 347 U.S. 501; Weber v. Anheuser-Bush, Inc., 1955, 348 U.S. 468.

[15] See Independent Petroleum Workers, etc. v. Esso Standard Oil Co., 3d Cir. 1956, 223 F. 2d 401; United Electric, etc., Local 259 v. Worthington Corporation, 1st Cir. 1956, 236 F. 2d 364. Note the late Chief Judge Parker's opinion in Textile Workers v. Arista Mills Co., 4th Cir. 1951, 193 F. 2d 529, 533-534, where he stated:

"We think it clear that parties may not by including a provision against unfair labor practices in a bargaining agreement vest in the courts jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the National Labor Relations Board. Where, however, substantive rights with respect to such matters as positions or pay are created by bargaining agreements, there is no reason why the courts may not enforce them even though the breach of contract with regard thereto may constitute also an unfair labor practice within the meaning of the act. As said by Chief Judge Jones in Reed v. Fawick

However, in this case, we must go one step further because substantially the same conduct here involved would constitute a violation of the contract and an unfair labor practice. The distinguishing point is that, while an act may be both an arbitrable contract violation *and* an unfair labor practice, a "breach of contract *is not* an unfair labor practice"; the former is enforced by the courts, the latter by the Board;[16] the former gives to private parties a remedy, the latter uses a private right

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Airflex Co., D.C., 86 F. Supp. 822, 823-824: 'It is clear that this Court has no jurisdiction to entertain a petition for relief as to unfair labor practices. Whether acts which constitute unfair labor practices under the statute have been committed by an employer and, if so, what remedies will be prescribed for the employees are matters within the exclusive jurisdiction of the Board.

"'If, however, a particular act is the subject of an agreement between employer and union and the union sues for breach of that contract, the District Court could not be ousted of its jurisdiction to hear and determine the case merely because the act constituted not only breach of contract but also an unfair labor practice.'

"Our conclusion on the first question is that, while there was no jurisdiction in the court to grant relief with respect to any refusal to bargain, which, if established, would be an unfair labor practice within the exclusive jurisdiction of the Labor Board, Amazon Cotton Mill Co. v. Textile Workers Union of America, supra, the court did have jurisdiction to grant relief with respect to the alleged breaches of contract relating to refusal to accord to striking employees the status and rights to which they were entitled under the bargaining agreement."

[16] See Association of Westinghouse Salaried Employees v. Westinghouse Electric Co., 1955, 348 U.S. 437, where the court stated at footnote 2, page 443: "It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42."

to effectuate the declared policies of the Act;[17] the former gives a certainty of decision, the latter leaves decision discretionary.[18] Section 10 (a) of the Act[19] states that the power of the Board over unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Will the submission of a contract violation, which is also an unfair labor practice, to arbitration "affect" this power of the Board? Certainly not. Since the Board's power is plenary in all respects, "neither the existence of an agreement to arbitrate nor a rendered award can preclude the Board from exercising its statutory jurisdiction."[20] But certainly an award or an agreement to arbitrate may serve to temporarily assuage the aggrieved party and afford validity to contract terms (even including unfair labor practices) until a final disposition of the matter of unfair labor practice be made by the Board. Even though the Board is not bound by an arbitration award, it may find that compliance with the award is not violative of the Act,[21] or it may even, in the exercise of its discretionary power, decline action because an award has been made or arbitration is possible.[22]

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[17] E.g., N.L.R.B. v. Olaa Sugar Co., 9th Cir. 1957, 242 F. 2d 714; Superior Engraving Co. v. N.L.R.B., 7th Cir. 1950, 183 F. 2d 783, cert. denied, 340 U.S. 930; N.L.R.B. v. Hudson Motor Car Co., 6th Cir. 1943, 136 F. 2d 385.

[18] E.g., N.L.R.B. v. Olaa Sugar Co., note 17, supra; N.L.R.B. v. Stoller, 9th Cir. 1952, 207 F. 2d 305; N.L.R.B. v. Swinterton, 9th Cir. 1953, 202 F. 2d 511, cert. denied, 346 U.S. 814.

[19] 29 U.S.C.A. §160(a).

[20] United Electrical R. & M. Wkrs. v. Worthington Corp., 1st Cir. 1956, 236 F. 2d 364, 368. See also N.L.R.B. v. Wagner-Iron Works, etc., note 14, supra.

[21] Spielberg Manufacturing Co., 112 N.L.R.B. 1080 (1955).

[22] See Spielberg Manufacturing Co., supra note 21; Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951); Note, 69 HARV. L. REV.

Such a practice may be at least a partial answer to the commonly known fact that the National Labor Relations Board has presented to it such a multitude of complaints and grievances that decisions are slow in forthcoming and many cases are refused review.[23] State tribunals have no jurisdiction in many areas of unfair labor practices even though the Board, because of its overflowing docket, has voluntarily relinquished jurisdiction but failed to cede jurisdiction to a state agency.[24] But "we cannot believe that Congress intended to create a no man's land where voluntary arbitration is barred and the National Labor Relations Board may be too overburdened to enter."[25] Certainly, if an otherwise arbitrable controversy happens also to be an unfair labor practice, the parties should not be forced to abandon their contract right and be relegated "to the slow and creaking procedure which, like a wounded snake, has dragged its slow length along, sans bargaining, sans labor peace, sans everything but pride of opinion, ill temper and frustration."[26] We think it too technical and obtrusive to attempt a division of the present controversy into a contract part and an unfair labor part. Such a division is merely a play on words. It is better to call the spade and say that enforcement of a contract to arbitrate grievances is different from an adjudication of

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725, 731-36 (1956). As cited in United Electrical, R. & M. Wkrs. v. Worthington Corp., 1st Cir. 1956, 236 F. 2d 361, 365.

[23] See Note, 69 HARV. L. REV. 725, 729, et seq.

[24] See Guss v. Utah Labor Board, 1957, 353 U.S. 1; Meat Cutters v. Fairlawn Meats, 1957, 353 U.S. 20; San Diego Unions v. Garmon, 1957, 353 U.S. 26.

[25] As stated in Post Publishing Co. v. Cort. Mass., 131 N.E. 2d 431.

[26] N.L.R.B. v. Roscoe Skipper, Inc., 5th Cir. 1954, 213 F. 2d 703, per Chief Judge Hutcheson in footnote 1, page 704.

an unfair labor practice by the National Labor Relations Board. This will prevent the nebulous determination of *what part* is contract and *what part* is unfair labor practice when the *one part* constitutes both.

We believe that this decision is required by the teaching of the recent *Lincoln Mills* cases.[27] While these cases did not concern an issue which was both contracted to be arbitrable and concerned unfair labor practice, they did establish two broad principles: first, that the United States district courts have the unequivocal statutory power to decree specific performance of collective bargaining contracts to arbitrate; and, second, that private arbitration in the labor-mangaement field is to be afforded broad liberalities. In this connection, the Supreme Court stated at 353 U.S. 455, 456, 457:

> "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.
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> * * *
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> "It seems, therefore, clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule, dis-

[27] Textile Workers Union v. Lincoln Mills, 1957, 353 U.S. 448; Goodall-Sanford, Inc. v. United Textile Workers, 1957, 353 U.S. 550; General Electric Co. v. Local Union 205, United Electrical Workers, 1957, 353 U.S. 547. Cf. The Item Co. v. New Orleans Newspaper Guild, 5th Cir. m/s. No. 17129, decided June 26, 1958.

cussed in *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, against enforcement of executory agreements to arbitrate. We would undercut the Act and defeat its policy if we read §301 narrowly as only conferring jurisdiction over labor organizations.

"The question then is, what is the substantive law to be applied in suits under §301 (a)? We conclude that the substantive law to apply in suits under §301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. See Mendelsohn, Enforceability of Arbitration Agreements Under Taft-Hartley Section 301, 66 Yale L.J. 167. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandate. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. See *Board of Commissioners v. United States*, 308 U.S. 343, 351. Federal interpretation of the federal law will govern, not the state law. Cf. *Jerome v. United States*, 318 U.S. 101, 104. But state law if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy. See *Board of Commissioners v. United States*, *supra*, at 351-352. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights."

Textile Workers v. Lincoln Mills, 1957, 353 U.S. 448, 455-57.

"*The range of judicial inventiveness will be determined by the nature of the problem.*" Within the spirit of the *Lincoln Mills* cases, and consonnant with other well reasoned decisions, the fact that the conduct here involved may constitute an unfair labor practice will not prevent it from being also an arbitrable contract violation.

REVERSED AND REMANDED

CAMERON, Circuit Judge: I concur in the result.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana

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No. 373

IN THE

Supreme Court of the United States

October Term, 1958

CAMERON IRON WORKS, INC., *Petitioner*

v.

LODGE NO. 12, DISTRICT NO. 37,
INTERNATIONAL ASSOCIATION OF MACHINISTS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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The sole respondent, Lodge No. 12, District No. 37, International Association of Machinists, a local union, herewith submits its brief in opposition to the grant of certiorari.

Subject to some matters noted below, we accept Petitioner's preliminary statement and statement of jurisdictional requisites. The Opinion of the Court of Appeals is now reported at 257 F. 2d 467.

Questions Presented

We accept the three tendered questions as stated by petitioner with this important caveat: Petitioner often uses the phrase, "admitted jurisdiction" of the National Labor Relations Board. Respondent reminds that Congress considered, and expressly rejected, the idea of making breach of a collective bargaining agreement an unfair labor practice. Congress deliberately concluded to place contract enforcement in the federal district courts and not in the Board.

A fourth question now tendered by Respondent is as follows:

Since the contract in question provides that any difference as to the meaning, application or interpretation of the provisions of the agreement shall be referred to the final and binding decision of a board of arbitrators, should the Court below have held that the question of arbitrability was for the arbitrator rather than for the court itself?

As the opinion below reflects, it was Respondent's first point on the appeal below that arbitrability was for the arbitrators to decide. This was not sustained by the Court. The Court sustained Respondent's second, and alternative, point that, in any event, the District Court misconstrued the contract. The Court of Appeals held that the discharges in question were arbitrable under the contract language and therefore reversed and remanded.

The above question is interwoven with Petitioner's three points. Respondent urges an affirmative answer to this fourth question as an alternative ground in support of the judgment of the Court of Appeals. We contend, in sub-

stance, that ti Court should have reached the same result but by a different route.

However, Respondent presents this additional question strictly on a contingent basis and does not wish to be understood as encouraging the grant of certiorari. In the interest of the 15 employees, we prefer the prompt return of the case to the District Court where the unduly withheld order to arbitrate may again be sought. We believe denial of certiorari is appropriate here for the reasons hereafter stated.

Statement of the Case

Supplementing Petitioner's statement, and at points correcting, we submit the following facts:

The collective bargaining contract in Article XX, its "Termination Clause," (Contract, p. 32) provides:

> "SECTION I. This agreement shall become effective as of June 1, 1956, and *remain in effect* through May 31, 1958, and thereafter from year to year subject to 60 days' written notice before the expiration of any yearly period (after the first two (2) years) of a desire by either the Union or the Company to amend, change, or terminate this agreement." (Emphasis added.)

The phrase "remain in effect" is clear enough language that the contract was not suspended or terminated during the strike which occurred during its term (April-June, 1957), the strike being authorized by the contract itself on the one question of wages by its wage reopening clause. Further, the quoted clause is repetitious that amendment, change

or termination can occur only "after the first two (2) years."[1]

Section 2 of the same Article XX (Contract, p. 32), the wage reopening clause, provides that the question of wages may be reopened during the term of the agreement one time during any contract year and if the negotiations fail to produte wage rate modifications after 60 days' notice "any limitation on the right of the Union to strike established by the terms expressed or implied by this agreement shall terminate on or after . . ." the 60th day.

The validity and beneficial purpose of the wage reopening clause has been fully recognized in *National Labor Relations Board v. Lion Oil Company*, 352 U.S. 282, 77 S. Ct. 330, 1 L. Ed. 2d 331 (1957). As there pointed out, this device enables parties in the industrial world to develop long-term bargaining relationships which in turn make for stability. Under its specific language, this contract did not terminate during the strike on wages but remained in full force and effect. The possible issues were thus contractually confined in advance, enabling them to be the more easily settled. During the contract term, if the employees should strike on an issue other than wages, for example, to obtain better vacations or to improve their hours of work, they would violate the no-strike clause of the contract. Furthermore, because of this contractual confinement of the issues in advance, if either party gained the upper hand in the economic contest over wages, it could not take advantage

[1] The contract in the form of a printed booklet is attached to the Transcript and is duly certified by the Clerk below as a part of the record as it was made up in the Court of Appeals. References to the booklet are clearly identified here thus: "Contract, p.———."

of the situation to make other demands for changes in the contract since these are prohibited for a period of two years. This is the basic fact with which Petitioner seems unable to come to grips, for throughout the Petition recurs the suggestion that the collective bargaining agreement "is silent on, and contains no provision whatever governing the actions and conduct of Petitioner, Respondent, or the employees during the course of a strike such as the one of the Respondent called under the wage reopening provision." (Petition, pp. 7-8.)

Beginning with a preamble which recites its purpose to promote, improve and maintain "industrial economic and harmonious relations between the Union and the Company," the contract provides, among other things, for the arbitration of grievances (Contract, pp. 4-8), including specifically discharge grievances (Contract, p. 4), the procedure of which follows the normal arbitration system. These clauses are supplemented by another proviso, Article XII, Section 13 (Contract, p. 20), which requires that a discharged employee be given the cause of discharge in writing within 36 hours of discharge. In addition, Article XIV, entitled "Seniority" (Contract, pp. 23-28), creates an elaborate system of plant and classification seniority specifying the order of promotion, layoff, down-grading, and restoration to service. (Contract, p. 25)

The contract also provides for the maintenance of a retirement program for the benefit of the employees (Contract, p. 33), sick leave provisions (Contract, pp. 28-30), vacations (Contract, p. 2, *et seq.*), and other contractual rights of a valuable substantive nature.

The management rights clause, Article XII, Section 3 (Contract, p. 17), reads as follows:

> "The management of the plant and the direction of the working forces, including but not limited to, the selection of employees; the scheduling and assignment of work, the right to hire, discipline, suspend, discharge, transfer, relieve employees from duty because of lack of work, or for other legitimate reasons, and all other rights not herein expressly relinquished are vested exclusively in the Company. This authority will not be used for purposes of discrimination."

This clause contains limitations. The company must act for legitimate reason; it must not discriminate; its rights are subject to all other adverse rights "expressly relinquished" in the contract.

We have here, therefore, a traditional case of a discharge grievance, wherein the Union seeks by arbitration (1) to review and set aside discharges claimed to be unjust and in violation of the contract, and (2) to restore these employees to their contractual rights of seniority, retirement, etc. A suit to compel arbitration of discharge is a Section 301 case as has been settled *General Electric Co. v. Local* 205, etc. 353 U. S. 547. The single complication which Petitioner raises is the fact that the terminations occurred following the settlement of the strike, enabling the company to tender a defense of misconduct during the strike which in turn is said by Petitioner to oust the Board of Arbitration of all its function in the matter.

The complaint (Tr. 5-13) nowhere alleges that the company violated the National Labor Relations Act or that any remedy should be granted on account of the Act.

The complaint alleges that there is a contractual right to arbitrate the discharges under the contract (Tr. 6), that the Union and the employees submitted their written grievances "claiming in substance that they were unjustly discharged and requesting reinstatement with all rights unimpaired and with pay for all time lost" (Tr. 7), and that the Court should mandatorily order petitioner to arbitrate (Tr. 9-10). The only alleged duty was stated thus: "Defendant is under contractual duty to entertain said grievances and submit the cause to arbitration as made and provided by the collective bargaining contract, but has failed and refused to do so" (Tr. 9).

Reasons For Denying The Writ

1. There is only remote analogy between the preemption argument here raised by Petitioner and the problem of state versus federal jurisdiction, under *Garner v. The Teamsters Union*, 346 U. S. 485, and succeeding cases through *Guss v. Utah Labor Relations Board*, 353 U. S. 1. Those decisions, and related cases, were concerned with the delegation to the National Labor Relations Board of jurisdiction to correct and prevent unfair labor practices under Section 10 (a) of the Act. Here the situation is the opposite. As the Court noted in the *Westinghouse* case,[2] 348 U. S. at 443, in footnote 2:

> ". . . It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' H. R. Conf. Rep. No. 510, 80th Cong., 1 Secs. 42. . ."

And, again, in *Lincoln Mills*,[3] 353 U. S. at p. 452, the Court quoted the same legislative history and again noted the important fact that although a refusal to abide a collective bargaining contract was originally declared to be an unfair labor practice in the bill, this feature was dropped in conference committee in favor of enforcement in the federal courts.

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[2] Association of Westinghouse Salaried Employees v. Westinghouse Electric Co., 348 U.S. 437.

[3] Textile Workers, etc. v. Lincoln Mills of Alabama, 353 U.S. 448.

2. Since determination of preemption *vel non* is a question of divining the legislative intent, such a crisp legislative history leaves little cause to imagine that the specifically provided machinery to enforce collective bargaining contracts in federal district courts should be paralyzed because of an imagined impingement on the exclusive area of the Board's function. In some ways this instance resembles Section 303 of the Act, 29 USCA Sec. 187, where Congress because of special considerations provided a federal action for damages sustained from commission of one of the unfair labor practices, the secondary boycott. Here Congress from other, but quite special, considerations created a federal court action, and entrusted it to the federal court "and not to the National Labor Relations Board."

3. The collective bargaining contract is the avowed end-product sought by Congress in enacting the statute and, if lawful, its enforcement is a matter of highest public policy as the means to remove obstructions to commerce. ". . . The Congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear . . ." this Court has held there is no reason to submit them to the inapposite requirements of Section 7 of the Norris-LaGuardia Act. *Lincoln Mills, supra,* 353 U. S. at 458-459. Likewise, we submit, the same Congressional policy renders it incongruous to forestall simple contract enforcement of a discharge grievance on grounds of preemption unless there is some actual conflict or confusion beyond that conjured in abstract debate.

4. No conflict or confusion is discernible from the decision below. Nor has any difficulty developed in the cases thus far. The several Courts of Appeals have approached the matter cautiously, to be sure, but in several well thought

out decisions, the harmonious conclusion has been reached that at least the essential substantive rights of collective bargaining contracts should be enforced according to the contract bargain. Thus the *quid pro quo* has been preserved to the contracting parties. The cases are discussed in our Argument Point I.

5. The National Labor Relations Board has not been given, nor has it claimed, authority to enforce these contracts or guarantee the delivery of the consideration promised by one party to the other. Neither has the Board exercised plenary power to interpret contract language except in so far as an agreement may be itself a violation of the statute, or an instrument of violation, or may be urged as a defense to an unfair labor practice charge. ". . . the Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice." *Local 1976, United Broth. of Carpenters v. N.L.R.B.*, 78 S. Ct. 1011.

6. The Board itself has in proper cases deferred to arbitration awards, or available arbitration procedures, to serve "the desirable objective of encouraging the voluntary settlement of labor disputes." *Spieberg Manufacturing Co.*, 112 N.L.R.B. 1080, 36 LRRM 1152 (1955), is a definitive opinion and policy statement by the Board which is discussed hereafter at p. 21.

7. The difficulties envisioned by Petitioner are not here. As the Court of Appeals held, submission of this discharge case to arbitration does not "affect" the Board's power to proceed, if the Board is so disposed, and thus Section 10 (a) is not violated. Indeed, the section contemplates that

"other means of adjustment or prevention" may exist.[1] The prohibition is against affecting the Board's power thereby. In the future, if the Board should proceed in a case already arbitrated and should reach a result contrary to an arbitration award, then that is the time a problem of accommodation might arise for decision through normal enforcement or review proceedings. But to arrest court enforcement of arbitration *in limine* because of some "argumentative coincidence in the facts adducible," *Association of Machinists v. Gonzales*, 78 S. Ct. 923, 925, which might, or might not, arise is to shy from a remote possibility of conflict when the policy of the law is to enforce the contract. The statutory scheme is not observed by such an approach. The effect on these labor contracts would be ruinous, for nearly every contract violation can present to the imaginative a lurking coincidence of evidence bearing upon an unfair labor practice charge. Certainly this is true of every discharge case.

8. And, unlike the hazards of disturbance or conflict which may result from the application of state law (which may intrude different, tangential or even hostile policy), here we have federal court interpretation and enforcement firmly anchored to the same statute and policies. Under the doctrine of *Lincoln-Mills*, ". . . federal interpretation of the federal law will govern, not state law." 355 U. S.

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[1] The phrase "other means of adjustment or prevention" in Section 10(a) can be read with little noticed Section 203(d), 29 U.S.C.A. Section 173(d) which contains a directive to the Federal Mediation and Conciliation Service:

"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

at p. 357. The federal law which the court must apply must be fashioned from the policy of our national labor laws. ". . . The Labor Management Relations Act expressly furnishes some substantive law . . . other problems will lie in the penumbra of expressed statutory mandates. Some . . . will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." 353 U. S. at 357. No doubt, the federal courts must be mindful of interpretations by the Board itself as a part of a proper concern for a harmonious result. This approach has already been adopted in the decision below and in other cases which are discussed in our Argument. While Board procedures will remain paramount insofar as the exercise of its jurisdiction over unfair labor practices is concerned, federal courts under the mandate of Section 301 will nevertheless assure the performance of the collective bargains.

9. As a matter of fact, however, it must be borne in mind that the complaint in this case does not allege that an unfair labor practice was committed. The complaint alleges that there is a contractual right to review the discharges. In substance this means that the Union claims that there is no proper cause under the contract for the discharge, taking into account the employees' seniority, their qualification as employees, their past records, the allegations against them, and other related matters. The appropriate test is to be designed by the Board of Arbitration under the contract language, taking into account the particular wording of the seniority clause, the grievance and arbitration clauses, the management rights clause, and other related provisions of the contract. Due allowance may be made by the Board of Arbitration for past practices in discharge cases for the meaning of the contract language, past arbitration decisions in this plant, arbitra-

tion precedents elsewhere, and related matters. Included within the determination would be whether or not the Company treated any of the 15 employees in a discriminatory manner in violation of the proviso in the management rights clause. The remedy would include not merely reinstatement to a job, but restoration of seniority rights, retirement rights, and other valuable property incidents of the collective bargain. Thus the employees' contractually protected rights are different from and broader than the right not to be discharged for union activities or the liability to discharge for unprotected activities. It is entirely possible that an employer may discharge an employee upon grounds which would in no sense violate the Act but which would clearly violate the contract.

11. Turning to Petitioner's argument that the decision below holding the discharges arbitrable under the contract is in conflict with a decision of the First Circuit (Petition, pp. 11-12), we think the opposite is immediately apparent. The First Circuit case, *Local 149 of American Federation of Technical Engineers (AFL) v. General Electric Company*, 250 F. 2nd 922, cert. denied, 356 U. S. 938, is a case which did not involve discharge problems at all. The case involved a claim that four employees in the bargaining unit were performing work equivalent to that required by a higher job classification than that for which they were being paid. The court held that the contract contained no language, either specific or implied, "for the purpose of determining whether the duties performed by any particular employee entitled him to be classified in any particular grade." 250 F. 2d 930. It also appears from that opinion that the arbitration agreement there involved contained a listing of arbitrable matters and an exclusion of others. The Court below construed the decision of the

First Circuit to mean that a matter is not arbitrable where a listing of many arbitrable incidences impliedly excludes an unlisted matter (see footnote 9 of the Court's Opinion, Appendix to Petition, p. 8). In the case at bar, discharges are specifically referred to and covered by the grievance-arbitration machinery, which remained in effect because of other express language, so that the case is entirely different from the First Circuit decision.

12. Petitioner's final reason for seeking the writ is a claimed conflict with two decisions of the Sixth Circuit (Petition, p. 12). Petitioner reasons that since the question of wages is not arbitrable, discharges incident to a strike over wages must likewise be held non-arbitrable, otherwise there is a conflict with the two cited holdings[5] to the effect that a claimed breach of a non-strike clause is not subject to arbitration.

Petitioner's reasoning is difficult to follow. It was entirely competent for these parties to contract, if they saw fit, that the question of a wage increase would be settled on the economic front if necessary, but that all other provisions of the contract should remain in effect and not be disturbed. There is nothing inconsistent between these two conceptions. Indeed, it is merely a matter of where the parties decided to draw the line between the contract clauses which could not be disturbed and those which would be put up for bargaining and, if necessary, for contest. The two decisions of the Sixth Circuit hold that in a suit for breach of the no-strike clause, the Union could not limit the Company to redress by arbitration. Right or wrong, nothing in those decisions touches the present case.

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[5] **International Union, United Automobile Workers v. Benton Harbor Malleable Industries**, 242 F. 2d 536; cert. denied, 355 U.S. 814, and **Hoover Motor Express Co. v. Teamsters Union**, 217 F. 2d 49.

Argument

Counter-Point I.

The Court of Appeals' decision is correct and substantially in keeping with the views of the several Circuits as well as the National Labor Relations Board.

In our "Reasons for Denying the Writ," we have stated Respondent's views on the marked difference between the enforcement of the collective bargaining contract on the one hand, and the intrusion of alien doctrines into the scheme of the National Labor laws on the other. At this point, we summarize the decisions of several Circuits touching upon the present problem.

The first Court of Appeals decision appears to be a 1951 opinion by Judge Parker in *Textile Workers v. Arista Mills Co.*, 193 F. 2d 529 (C.A. 4, 1951). There a strike settlement agreement was executed providing for the reinstatement of certain striking employees. Claiming that the Company had violated the reinstatement agreement, the Union brought suit in federal court under Section 301 to fix the rights of the unreinstated strikers. The Company raised the same defensive preemption argument that is presented here, namely, that the matter was nothing more than the charge of an unfair labor practice over which the National Labor Relations Board is given exclusive jurisdiction. In overruling this defense, Judge Parker analyzed it thus (193 F. 2d at 533-534):

> ". . . We think it clear that parties may not by including provisions against unfair labor practices in a bargaining agreement vest in the courts jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the National Labor Rela-

tions Board. *Where, however, substantive rights with respect to such matters as positions or pay are created by bargaining agreements, there is no reason why the Courts may not enforce them even though the breach of contract with regard thereto may constitute also an unfair labor practice within the meaning of the act.* As said by Chief Judge Jones in *Reed v. Fawick Airflex Co.*, D. C., 86 F. Supp. 822, 823-824: 'It is clear that this Court has no jurisdiction to entertain a petition for relief as to unfair labor practices. . .'

* * *

"If, however, a particular act is a subject of an agreement between employer and union and the union sues for breach of that contract, *the District Court could not be ousted of its jurisdiction* to hear and determine the case merely because the act constituted not only breach of contract but also an unfair labor practice."

* * *

"Our conclusion on the first question is that, while there was no jurisdiction in the court to grant relief with respect to any refusal to bargain, which, if established, would be an unfair labor practice within the exclusive jurisdiction of the Labor Board, . . . *the court did have jurisdiction to grant relief with respect to the alleged breaches of contract relating to refusal to accord to striking employees the status and rights to which they were entitled under the bargaining agreement.*" (Emphasis added.)

The next decision appears to be *Independent Petroleum Workers of N. J. v. Esso Standard Oil Company*, 235 F. 2d 401 (C.A. 3, 1956.) There the Union brought a Section 301 suit to compel an employer to abide by an express contractual commitment which required the Company to negotiate with the Union a salary rate for any new job classification established by the Company. The Company

defended on the ground that the Union's claim amounted to nothing more than a refusal to bargain (Section 8 (a) (5) of the Act) and that the case was subject to the exclusive jurisdiction of the National Labor Relations Board. In overruling the defendant's contention, and in ordering enforcement of the contract, the Court cited and followed Judge Parker's opinion in the *Arista Mills* case, *supra*, and several determinative Board decisions. Because this opinion of the Third Circuit contains a concise summary of Board policy pertaining to the matter, as well as the Court's reasoning, we take the liberty to quote it extensively. After noting the legislative history cited in footnote 2 of this Court's opinion in *Westinghouse*, to the effect that enforcement of collective bargaining contracts is for the Courts and not for the Board, the Third Circuit said (235 F. 2d 401-405):

> "That such jurisdiction belongs exclusively to the courts was held by the National Labor Relations Board in United Telephone Company of the West, 112 N.L.R.B. 799 (1955).
>
> "Said the Board, page 782:
>
> 'The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.'
>
> "The Board, citing prior rulings, stated (page 781):
>
> 'As the Board has held for many years, with the approval of the courts: "* * * it will effectuate the statutory policy * * * for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act."'

"It is pertinent to note that in United Telephone Company of the West, supra, the union and employer gave conflicting interpretations to overtime provisions in their collective bargaining contract and when they were unable to agree the employer filed a suit for declaratory judgment. The union thereupon filed a Complaint with the Board charging unfair labor practices. The Trial Examiner in his Intermediate Report found against the employer. The latter filed exceptions to the Report contending that it had a right to submit the dispute as to the correct interpretation of their contract to the courts rather than to the Board. The Board agreed, stating (page 780):

> 'Inasmuch as the issue of the construction of the contract is now pending before a court of apparent jurisdiction no valid reason exists for the Board to enter this controversy.'"

* * *

"The defendant seeks to avoid the impact of the cases cited by insisting that its failure to negotiate on the salary rate for the new job classification as required by the collective bargaining contract is simply 'an unfair labor practice' as to which the National Labor Relations Board has exclusive jurisdiction.

"Otherwise stated, the defendant's position is that it has breached its contract, that it acted 'unfairly' in doing so, but willy-nilly, since the violation was a breach of a labor contract, that it is by virtue of that fact 'an unfair labor practice' and as such beyond the reach of the Taft-Hartley Act. Defendant seems unaware that Section 301 (a) by its terms specifically deals with 'Suits for violation of contracts between an employer and a labor organization' and that Congress provided that federal courts should have jurisdiction with respect to such contract breaches.

"The answer to defendant's position was given in *Reed v. Fawick Airflex Co.*, D.C. Ohio 1949, 86 F. Supp. 822, 823, 824. It was there said:

'If, however, a particular act is the subject of an agreement between employer and union and the union sues [under Sec. 301 (a)] for breach of that contract, the District Court could not be ousted of its jurisdiction to hear and determine the case merely because the act constituted not only breach of contract but also an unfair labor practice.'

"That holding was cited with approval and followed in *Textile Workers Union of America v. Arista Mills Co.*, 4 Cir. 1951, 193 F. 2d 529, decided on other grounds. Moreover, as earlier stated, the Supreme Court succinctly ruled in Note 2 of its opinion in the *Westinghouse Electric Corp.* case that 'breach of contract is not an "unfair labor practice."'"

A recent opinion of the First Circuit in *United Electrical, etc., Local 259 v. Worthington Corporation*, 236 F. 2d 364 (C.A. 1, 1956) reaches the same result. In that case arbitration was sought for the discharge of two employees who refused to testify before a state un-American activities committee concerning Communist affiliation. For this performance they were discharged. The union filed a grievance which complained (1) that the company unfairly introduced new conditions of employment, and (2) that the employees were unjustly discharged under the contract. A majority of the Board of Arbitration ruled that the dispute was arbitrable and that the two discharges were not justified under the contract. When the company refused to comply with the award, the union brought suit under Section 301 to enforce the award. The District Court dismissed the complaint on the same ground as defendant urges here, namely, that exclusive jurisdiction over the dispute rested in the N.L.R.B., 136 F. Supp. 31. The Court of Appeals in an exhaustive opinion concluded that the exclusive jurisdiction of the Labor Board did not

apply to the discharge in violation of the contract. We quote 236 F. 2d at 370:

> "At the very least, the situation in the instant case consisted of a presentation by the Union of two issues for grievance processing and arbitration, or two grounds for charging that the same action of the Company was wrongful. One such issue or ground, the failure to consult the Union in advance, may be a question preempted to the jurisdiction of the N.L.R.B.; the other, the dismissal of two employees without just cause under the contract, clearly was not subject to N.L.R.B. jurisdiction. Certainly the preemption doctrine should not lift from the jurisdiction of other tribunals cases which the N.L.R.B. cannot lawfully decide (where there is no doubt that the case is outside the bounds of the Board's statutory jurisdiction)."
>
> * * *
>
> "Therefore we conclude that the arbitrators in the present controversy had jurisdiction over the allegation that the discharges were not for just cause under the contract, even though it be assumed for the moment that the Union was also presenting an allegation of refusal to bargain before imposing a new condition of employment, which later assertion may be a matter for exclusive cognizance by the N.L.R.B. The majority decision of the arbitrators in fact passed only upon the wrongful discharge aspect of the case and turned aside the refusal to bargain aspect . . ."

The opinion of the First Circuit comports with the prior decisions of the Fourth and Third Circuits. In addition, the First Circuit again made careful inspection of Board policy where the Board itself has declined to act on unfair labor practice charges where an arbitration award has been made or is available (236 F. 2d at 368).

Of real interest in this connection is the recent decision of the Board in *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955), 36 LRRM 1152.

In that case, the employer refused to a group of its striking employees reinstatement to their jobs. The record showed that as part of the settlement of the strike, the union and company agreed to arbitrate the question of whether four strikers whom the company did not wish to reinstate because of alleged strike misconduct, should be reinstated. Thereafter, the union ratified the strike settlement, and the arbitration was held. The arbitration panel ruled that the company was not obliged to reinstate these four employees. Thereafter, the employees filed a charge before the N.L.R.B.

The Trial Examiner of the N.L.R.B. found that the refusal to reinstate these four strikers violated the statute. He held that he was not bound by the arbitration award.

In reversing the Trial Examiner, the N.L.R.B. said:

> "We agree with the Trial Examiner that the Board is not bound, as a matter of law, by an arbitration award. As the Court said in the *Disney case*:
>
> 'Clearly agreements between private parties cannot restrict the jurisdiction of the Board. We believe the Board may exercise jurisdiction in any case of an unfair labor practice, when in its discretion its interference is necessary to protect the public rights defined in the Act.'
>
> "The Board has exercised its discretion in the past to remedy an unfair labor practice, even though the parties had used arbitration to dispose of an issue. In so doing, in the *Monsanto* case, the Board said:

"'There can be no jurisdiction for deeming ourselves bound as a policy matter, by an arbitration award which is at odds with the statutes. We shall therefore disregard the award in this case.'

"And in the *Wertheimer* case, the Board pointed out that where the arbitration had been carried out over the opposition of the individual involved, the circumstances were not such as to warrant the Board, in its exercise of its discretion, to decline to assert its jurisdiction.

"In the instant case, the factors which impelled the Board to exercise its jurisdiction in *Monsanto* and *Wertheimer* are not present. Thus, the arbitration award is not, as it was in *Monsanto*, at odds with the statute. This does not mean that the Board would necessarily decide the issue of the alleged strike misconduct, as the arbitration panel did. We do not pass upon that issue. . . . In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award. Accordingly, we find that the Respondent did not violate the Act when, in accordance with the award, it refused to reinstate the four strikers. . . ."

Thus, it is clear from this modern decision, that the Board, in its expertise, does not treat arbitration awards as totally pre-empted by Board processes, but in proper cases it actually follows arbitration awards in recognition of the public policy which favors this type of settlement of industrial controversy.

From the foregoing treatment of the problem, by the First, Third and Fourth Circuits, read with the present decision and with the decisions of the Board, we think that it can at least be said that the several Circuits and the Board are in harmony in this matter. All the opinions reflect a proper analysis of the role of the federal district courts in the enforcement of collective bargaining contracts. In each case, the possible application of the pre-emption doctrine has been thoughtfully considered. No difficulty in terms of conflict or confusion has yet arisen. Respondent respectfully submits that up to this point the way has proved clear.

Except for the present case, at the time of decision of all the above cited authorities, the *Lincoln Mills* opinion was not yet available. In two respects that opinion confirms the results previously reached and minimizes both legal and practical problems as regards this particular preemption argument. First, the Congressional policy decision to promote enforcement of arbitration awards in the federal courts has been recognized and settled. Second, the identification of the contract as one to be interpreted and enforced as a matter of federal law reflecting the policy of the statute, eliminates all theoretical conflicts and, we think, most potential practical conflicts. The function of the courts and the Board are now mutually complementary in keeping with one over-all scheme designed by Congress. By preserving freedom of choice and preventing unfair labor practices, the Board nurtures the contract. When the contract has been arrived at, the courts assure its performance, mindful of its statutory auspices and restrictions. Since no difficulty manifests itself, we submit there is no present occasion for the Supreme Court to disturb the orderly developments up to this point.

Counter-Point II.

The Court of Appeals decision on contract interpretation is correct. The strike settlement agreement is not the decisive document. There is no conflict with the decision of another Court of Appeals.

In its Point II, Petitioner argues that since the strike settlement agreement did not mention arbitration and since it referred to the return to work of strikers "lawfully entitled to reinstatement", there was no agreement to arbitrate. There being no such agreement, the claim is, a conflict exists with a decision of the First Circuit in *Local 149, etc. v. General Electric Company*, 250 F. 2d 922 (Petition, pp. 18-20).

The strike settlement agreement is actually a letter written by the Company and accepted by the Union (Tr. 12). The obvious explanation for the fact that the settlement memorandum does not mention procedures for arbitration is the fact that such procedures were already provided in the basic collective bargaining contract. The basic contract is mentioned in another part of the settlement memorandum (Tr. 11), so its existence was plainly contemplated by the parties. The phrase "strikers who were lawfully entitled to reinstatement", to which Petitioner attaches so much significance, occurs in a paragraph which obviously provides the mechanics and timing of the return to work of the employees who are going to return to work (Tr. 12). The document does not say that other employees will be subjected to the unilateral mercies of the Company, neither does it say that the existing rights under the basic labor agreement should be suspended or taken away from any person who was entitled to its protection.

As stated before, the basic contract which remains in effect for two years by its own literal language, contains grievance and arbitration procedures applicable to discharges, as well as related clauses covering the rights of discharged employees. The form and substance of the memorandum of settlement (a letter) does not support Petitioner's conclusion that it was intended to be a formal amendment of the contract. Indeed, it would violate the contract for the Company to insist upon settlement which would change the basic agreement by suspending the right to an arbitration trial for any discharged person. This would introduce extraneous issues into a dispute limited to wages. Therefore, it could not be lightly inferred either that the Company accomplished any impairment of the basic agreement by the settlement memorandum or that the Union would knowingly agree to such a result since the Union was at all times contractually protected against any demand by the Company to suspend or destroy contract language pertaining to arbitration of discharges. The Company would have no more right to demand that arbitration be suspended than the Union would have the right to demand an improvement in some other part of the contract on a subject other than wages. We submit that Petitioner's emphasis on the settlement memorandum is irrelevant to the contract interpretation which was correctly made by the Court of Appeals.

As to the claim that there is some conflict between this decision and the First Circuit Opinion in the *General Electric Company* case, the contracts were different as we demonstrate at p. 13 of this brief.

Counter-Point III.

There is no merit to Petitioner's claim that these discharges are not arbitrable because the issue of wages was not arbitrable. There is no conflict with any of the cited decisions as claimed by Petitioner.

We have already answered this point at p. 14 of this brief. This is simply a case where the parties contracted to retain in effect the entire contract with the exception of the one issue of wages, leaving the latter to bargaining and, if necessary, economic contest. Petitioner here is engaging merely in exercises in logic, proceeding from premises which the contracting parties did not adopt when they drafted their contract.

The various decisions cited at p. 22 of the Petition hold that where a union breaches a no-strike clause, it may not insist that the employer claim its damages solely through arbitration. They hold that the employer may sue directly to recover such damages.

There is no way that the present litigation affects that problem and it is a *non sequitur* for petitioner to argue that because wages are not arbitrable under this contract, or because a suit for the breach of the no-strike clause might be non-arbitrable, that it must also inexorably follow that discharges of strikers is non-arbitrable. It so happens that a clear and correct contract interpretation demonstrates that the parties did in fact draw the line at a place where Petitioner claims they could not logically do so.

Counter-Point IV.

The Court of Appeals should have reached the same result of reversing and remanding this case by holding that the question of arbitrability was for the arbitrators. This fourth question is tendered by Respondent and is intimately involved with all questions presented by Petitioners.

Again emphasizing that the writ of certiorari should be denied, Respondent calls attention to this fourth question.

The contract provides in Article IV (Contract, p. 4):

> "SECTION 2. Should any difference arise between the Company and any employee as to the meaning, application or interpretation of the provisions of this agreement, such difference may constitute a grievance and shall be settled as follows:"

There then follows a description of procedures to be followed in successive steps (Contract, pp. 4-5). The grievance goes forward:

> "If, in the opinion of a majority of the plant committee, a bona fide grievance does exist . . ." (Contract, p. 5.)

Article V, the arbitration clause, provides for the selection by agreement of a disinterested third person. If agreement cannot be reached, the third arbitrator is selected by request to the Federal Mediation and Conciliation Service for a list of five eligible arbitrators, who are pared down to one by a detailed selection process (Contract, p. 8).

The delegated powers of the Board of Arbitration is described thus (Contract, pp. 7-8):

> "SECTION 2. The Board of Arbitration shall render a decision within fifteen (15) days from the date the hearing is completed. The terms and conditions of settlement shall be within the sole discretion of the Board and the decision of a majority of the Board shall be final and binding on the parties; provided, however, the Board shall have no authority to violate, contravene, disregard or supplement the terms of this agreement."

The District Court held that these discharges are not arbitrable under the contract because the strikers were not "employees"—hence, there was no question of discharge, but only a question of employment or re-employment (see footnote 3, Appendix to Petition, p. 5). The enormity of this error is so apparent that discussion is unnecessary.

On appeal below, this Respondent as appellant urged as its first point that the District Court should have recognized that the final and binding decision concerning the meaning, application or interpretation of the contract was a matter for the Board of Arbitration. Respondent argued that by the plain meaning of words "any difference" as to the application of the contract means any disputes as to whether the contract, or any provision in it, applies to a given situation or problem. The same is true of the terms "meaning" and "interpretation." Respondent argued that it does not satisfy the bargain in

the contract to award plaintiff an answer to these broad questions in another forum. Well within the proper and lawful contemplation of the parties might have been a mutual desire to submit their disputes to persons of specialized experience in the labor relations field.

Respondent argued that in placing the final and binding decision within the sole discretion of the Board of Arbitration, the parties were providing a substitute for labor dispute, and not a substitute for litigation. Arbitration is widely developed, well reported and well understood in the industrial world, and accordingly it was fair to assume that the parties here consciously referred their contract disputes to a system and institution of established credibility and proven value.

Finally, it was argued that by its very nature, a collective bargaining contract is superimposed upon practices, habits, and ways of life of an industrial operation and much of its meaning must be derived from this background. In interpreting such a contract, due allowance must be made for past practice, past arbitration, arbitration precedents and other related matters. Accordingly, Respondent argued that the case here was plainly a "difference" between the parties within the meaning of the phrase and that the Court should rely upon the arbitrators to reject unmeritorious claims. Alternatively, Respondent argued, that if more is required, it is plain that the claim here advanced is not patently baseless or frivolous under the terms of the contract, but is maintained fairly and justly in view of the various contract clauses and the facts.

The Court of Appeals acknowledged that "there is much to say in favor of Appellant's argument" and referred to a substantial and respectable body of thought along the lines of Respondent's position (Appendix to Brief, p. 6; footnote 4). But the Court concluded that judicial authority has with practical unanimity held the question of arbitrability to be an issue for the courts. The Court deduced several "rules of construction" discernible from the case which it summarized thus (Appendix to Petition, p. 8):

> "We consider the general rule to be that a dispute between labor and management is arbitrable where the dispute is specifically contracted to be arbitrable or generally where the contract expresses a broad arbitration policy, i.e., a general arbitration clause; but controversies are not arbitrable where the controversy in question is specifically excluded, where because of a listing of many arbitrable incidences the instant controversy is impliedly excluded, and where the controversy or grievance concerns violation of a 'no strike clause'" (Footnotes omitted).

In so summarizing the rule, the Court also referred to the interpretation of collective bargaining contracts as a part of the "search for true tranquillity in the industrial world" (Appendix to Petition, p. 7), and to the fact that "private arbitration in the labor-management field is to be afforded broad liberalities" (Appendix to Petition, p. 14). As to the case at bar, the Court reasoned that not only are discharge grievances specifically covered, but the general provision "any difference" refers to a broad, inclusive coverage by the whole contract, including its preamble. Thus,

the case is arbitrable, the Court held, "in order to preserve the terms of the contract relating to seniority, retirement, etc., and to carry out its general intent and purposes". (Appendix to Petition, pp. 8-9).

Respondent acknowledges that the Court of Appeals, while anchoring itself to the principle that arbitrability is for the courts to decide, nevertheless declared a rule which is reasonably hospitable to private arbitration. We think that parties to collective bargaining contracts can live with such a declaration, at least pending further experience.

Respondent, however, still adheres to its position below that in the long run the better rule, consistent with the policies of the Act, is to leave arbitrability to the arbitrators where the language of the contract, as here, plainly says so in the literal words. The presumed expertise of the arbitrators applied to the practices and realities of the plant in question enables the negotiators of the contract to arrive at their bargain more easily. If federal courts, now placed astraddle of collective bargaining contracts by *Lincoln Mills*, commence a course of technical and narrow reading of these contracts, they will inevitably force the negotiators to become correspondingly more quarrelsome concerning technicalities of contract language, thereby damaging the collective bargaining process. For last year's comfortable language, clear enough to those who know the plant practice, may seem insufficient to the federal judge to leave anything to the arbitrators. It is for this reason that Respondent preserves the point.

Conclusion

Respondent respectfully submits that the Petition for Writ of Certiorari to review the judgment of the Court below should be denied.

Respectfully submitted,

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Certificate

Service on counsel for petitioner has been duly made in person on October 25, 1958 and has been properly certified to the clerk.